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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1377

MARRA BROS., INC.,

Petitioner,

—against—

JACK LONGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY A. SCHWARTZ
Attorney for Petitioner
76 Beaver Street
New York, New York 10005
(212) WH 4-2633

INDEX

PAGE

Citations to Opinions Below 2

Jurisdiction 2

The Questions Presented 2

Reasons for Granting the Writ—

I. Where the plight of the stevedore respecting indemnity is recognized by all courts and where fundamental principles of the common law and equitable considerations allow indemnity in favor of a master against his negligent employee, this Court should declare the maritime law on this subject, especially where the U.S. Court of Appeals for the Second Circuit is the only Appellate Court which has treated with the subject 4

A. Marra Brothers, Inc., has been held liable solely and wholly because of the plaintiff's negligence. On well established principles of indemnification dealing with the right of a master to recover from his employee who has cast him into liability, Marra Brothers, Inc., is entitled to indemnity against the plaintiff on its counterclaim 4

Conclusion 14

Appendix—

Memorandum Decision by Murphy, *D.J.* 1a

Opinion of the Court of Appeals 3a

PAGE

Judgment of the Court of Appeals 5a

Opinion of the Court of Appeals 7a

Extract of Minutes 16a

Table of Authorities

Cases:

Cavelleri v. Isthmian Lines, Inc., 189 F. Supp. 525 (S.D.N.Y. 1960), reargument denied, 190 F. Supp. 801 (1961) 10n, 11

Codrington v. United States Lines Company, 168 F. Supp. 261 (S.D.N.Y. 1958) 6

Crosson v. N.V. Stoomvart, No. 422, decided April 16, 1969, Docket No. 31372, pp. 1911-1919 of Slip Sheets, dissenting opinion of Moore, C.J. 14

Cusumano v. Wilhelmsen, 267 F. Supp. 164 12

Denver-Chicago Trucking Company v. Lindeman, 73 F. Supp. 925 6

Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd., 89 S.Ct. 1144, 1153 ..... 5, 13

Holmes v. Mississippi Shipping Company, 301 F.2d 474, 481 8

Horton v. Moore McCormack Lines, 326 F.2d 10 5

Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962) 10n, 11, 13

Lowry v. R. H. Macy & Co., 119 N.Y.S. 2d 5 7

Malfitano v. King Line, Ltd., 198 F. Supp. 399, (S.D. N.Y. 1961) 10n, 12

PAGE

McClendon v. Charante Steamship Company, 348 F.2d 298 8

McLaughlin v. Trelleborgs, U.S.C.A. 2d Cir. (1969)....3, 11, 14

Mortensen v. A/S Glittre, 348 F.2d 382 11

Nicroli v. Den Norske, 332 F.2d 656 .....9, 10, 13

Nicroli v. Den Norske Afrika, 332 F.2d 651 9

Oceanic Steam Navigation Company v. Compania Transatlantica Espanola, 134 N.Y. 461, 467 4

Paluch v. Erie Lackawanna, 387 F.2d 996, 1003 14

Schneiberg v. Hutz, 8 Misc. 2d 535 6

Shenker v. United States, 322 F.2d 622, 629-630 ..... 7, 8

Strachan Shipping Company v. Melvin, 327 F.2d 83 (dissenting opinion of Brown, C.J.) 8

Thomas v. Malco Refineries, 214 F.2d 884, 886 6

Thompson v. American Export Lines, 15 F. R. D. 125 (S.D.N.Y. 1953) 5

Statutes:

Rule 14, F.R.C.P. 8

Rule 15, F.R.C.P. 11

28 U.S.C. § 1254 (1) 2

United States Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. 2, 13

Other Authorities:

42 Corpus Juris Secundum, pp. 597-598 4

PAGE

Harper & James, The Law of Torts 1363 (1956) 5

2 Larson, Workmen's Compensation Law § 71.10 (1952) 5

Mechem, Outlines of Agency § 333 (Third Edition, 1923) 5

Michigan Law Review, Vol. 61, No. 3, Longshoreman-Shipowner-Stevedore: The Circle of Liability 8

3 Moore, Federal Practice § 14.29 (1938) 5

Prosser on Torts, Second Edition (1955), p. 250, § 46 5

Restatement, Restitution § 96 (1937) 5

Senate Report N. 973, 69th Congress, First Session, 16 13

Stanford Law Review, Feb. 1968, Vol. 20, No. 3, "The Tar Baby": Maritime Personal-Injury Indemnity Actions 8, 12

Woodward, Quasi Contracts § 258 (1913) 5

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No. .....

MARRA BROS., INC.,

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—against—

JACK LONGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Marra Bros., Inc., hereinafter referred to as Marra, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 11, 1969, affirming the judgment of the United States District Court for the Southern District of New York dismissing the counterclaim of the petitioner for indemnity against the respondent herein. The latter's negligence had been imputed to the petitioner and by that imputation of negligence the petitioner has been held liable to the shipowner for a breach of the petitioner's warranty to do its work in a workmanlike manner (WWP).

Citations to Opinions Below

The memorandum decision of the District Court (Murphy, D. J.) is found in the Appendix (1a).

The Per Curiam opinion of the United States Court of Appeals for the Second Circuit which has been filed by that Court is not yet reported but is printed in the Appendix hereto (3a).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 11, 1969 (Appendix 5a) and this petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the entry of said judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Questions Presented

1. Where a stevedore-employer has been held liable to indemnify a shipowner because of the former's breach of warranty of workmanlike performance which breach has been occasioned solely and wholly by the plaintiff-employee's negligence, is not the stevedore-employer on well established principles of indemnification entitled to be indemnified by the plaintiff-employee?

2. Where a stevedore-employer has been cast into liability to indemnify a shipowner solely and wholly because of its employee's negligence is it not entitled to indemnification in admiralty without the United States Longshoremen's and Harbor Workers' Compensation Act or

any other policy considerations in any way precluding that right of indemnification?

The action was initially instituted by Longo against Lehigh Valley Railroad Co. to recover damages for personal injuries which he sustained on May 31, 1960 aboard the Lighter 357. Longo was the employee of Marra and in the usual course of this type of litigation Lehigh Valley Railroad Co., the owner of the Lighter, by third-party complaint impleaded William Spencer & Son Corporation and also Marra and sought indemnity from each of them. Spencer asserted a cross-complaint against Marra seeking indemnity on the basis of Marra's breach of warranty of workmanlike service.

After a trial of this matter before a jury Longo recovered against Lehigh because of the unseaworthiness of the Lighter 357. The jury awarded him damages which were eventually reduced by virtue of Longo having been found to be 75% contributorily negligent.

Judge Murphy awarded indemnity against Marra *solely* and *wholly* by reason of Longo's negligence being imputable to Marra and having accounted for 75% of Longo's injuries. The District Court dismissed Marra's counterclaim against Longo (Appendix 16a).

On appeal to the U. S. Court of Appeals for the Second Circuit, that Court affirmed the judgment dismissing the counterclaim on the basis of its decision of January 30, 1969 in *McLaughlin* v. *Trelleborgs,* which decision is printed in the Appendix hereto (Appendix 7a). A petition for a writ of certiorari in *McLaughlin* has been filed in this Court on April 26, 1969 and bears docket number 1334.

Reasons for Granting the Writ

I.

Where the plight of the stevedore respecting indemnity is recognized by all courts and where fundamental principles of the common law and equitable considerations allow indemnity in favor of a master against his negligent employee, this Court should declare the maritime law on this subject, especially where the U.S. Court of Appeals for the Second Circuit is the only Appellate Court which has treated with the subject.

A. ***Marra Brothers, Inc., has been held liable solely and wholly because of the plaintiff's negligence. On well established principles of indemnification dealing with the right of a master to recover from his employee who has cast him into liability, Marra Brothers, Inc., is entitled to indemnity against the plaintiff on its counter-claim.***

The sole predicate of liability of Marra to Spencer was Longo's negligence. No other employee of Marra has been found to have in any way been responsible for Marra having breached its warranty of workmanlike service to Spencer.

It is a well-established and a familiar principle of law that where a master has been held liable to a third party because of the imputed negligence of a servant, the master can obtain indemnity from the negligent servant. *Oceanic Steam Navigation Company* v. *Compania Transatlantica Espanola,* 134 N.Y. 461, 467. Thus, in 42 *Corpus Juris Secundum,* pages 597-598, the principle is found as follows:

> "An agent or employee is liable to his principal or master for damages which the latter was compelled to pay to third persons solely because of the negligent or other wrongful act of the agent or employee; and

it is no defense to the servant that other persons were also culpable."

To the same effect, see:

Restatement, Restitution §96 (1937);
Prosser on Torts, Second Edition (1955), page 250, §46;
3 Moore, Federal Practice §14.29 (1938);
Mechem, Outlines of Agency §333 (Third Edition, 1923);
Woodward, Quasi Contracts §258 (1913);
2 Larson, Workmen's Compensation Law §71.10 (1952);
Harper & James, The Law of Torts 1363 (1956).

On a cognate subject is this Court's opinion of April 1, 1969 in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co. Ltd.,* 89 S.Ct. 1144, 1153.

The right of an employer to recover indemnity from his employee for any liability which the employer may have to a third person has frequently been before the Courts and such right has been upheld. The Court from which this case emanates granted indemnity to a shipowner from the assaulting seaman who cast the shipowner into liability—this, on the basis of the employee's implied agreement to perform his duties in a proper and seamanlike manner. *Horton* v. *Moore McCormack Lines,* 326 F.2d 104.

In *Thompson* v. *American Export Lines,* 15 F. R. D. 125 (S. D. N. Y. 1953), the motion of the defendant corporation to implead one of its employees was granted over the opposition of the plaintiff. The Court held that the defendant could look to its employee for indemnity to the extent

that the employee's wrongful act imposed liability on the defendant to the plaintiff.

Again, in *Codrington* v. *United States Lines Company,* 168 F. Supp. 261 (S. D. N. Y. 1958), the defendant corporation was permitted to implead one of its employees for indemnity notwithstanding the plaintiff's opposition to such motion.

In *Thomas* v. *Malco Refineries*, 214 F. 2d 884, 886, the Court stated:

> "In cases where the wrongful act or omission of a person causes injuries to another, and a second person, guilty only of imputed or constructive wrong, *because of his legal relationship to the primary wrongdoer or his positive legal duty to the person injured,* is also liable to the latter for the damages suffered, and such second person has discharged such liability, he is entitled to indemnity from the primary wrongdoer for the entire amount paid to discharge such liability. *The principle applies where an employer under the doctrine of respondeat superior is compelled to pay damages to a third person solely because of the negligence or other wrongful act of his employee.*" (Italics added.)

In *Denver-Chicago Trucking Co.* v. *Lindeman*, 73 F.Supp. 925, the Court stated as follows (page 933):

> "It is the general rule that a servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligence of the servant where the master himself is not at fault."

In *Schneiberg* v. *Hutz*, 8 Misc. 2d 535, the servant who had been impleaded sought to dismiss the third-party complaint which had been served upon him by his employer.

The Court denied such motion and held that a master has the right to recover over against a negligent servant for liability imposed derivatively upon the master by reason of the servant's negligence. In *Lowry* v. *R. H. Macy & Co.*, 119 N. Y. S. 2d 5, the defendant, R. H. Macy & Co., was adjudged liable to the plaintiff by reason of the negligence of its employee, one Doherty. R. H. Macy & Co. was then granted judgment over against said employee Doherty since it as the employer of Doherty had been adjudged liable to the plaintiff by reason of Doherty's fault.

As the decisions above set forth indicate, there can be no question about the right of an employer to recover indemnity from its employee where the employer has been cast into liability to a third person by reason of the negligence of its employee.

In his dissenting opinion in *Shenker* v. *United States*, 322 F. 2d 622, 629-630, Circuit Judge Friendly said:

> "The pushing of a 'principle or precedent * * * to the limit of its logic' may take it to a point where it collides with another of greater pertinency and applicability. Cardozo, The Nature of the Judicial Process, 40, and id. at 43. That, in my view, is the result of holding that a shore-based record keeper, covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§901-950, who stubbed his toe against a plainly visible board, four feet long, a foot wide and an inch thick, can recover $25,000 (reduced to half that sum because of his contributory negligence) for unseaworthiness of the ship against the United States—which then receives indemnity from the stevedoring company for sending on board a clerk who took such poor care of himself."[1]

In footnote 1, Circuit Judge Friendly further stated:

> "Perhaps the circle will be completed by the stevedoring company's recovering from Shenker for breach of his undertaking to keep his eyes open, implicit in his contract of employment. Compare Malfitano v. King Line, Ltd., 198 F. Supp. 399, 401 (S. D. N. Y. 1961), with Cavelleri v. Isthmian Lines, Inc., 189 F. Supp. 525 (S. D. N. Y. 1960), (reargument denied 190 F. Supp. 801 (S. D. N. Y. 1961), and Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S. D. N. Y. 1962)."

See also *Michigan Law Review*, Vol. 61, No. 3, *Longshoreman-Shipowner-Stevedore: The Circle of Liability.*

The plight of the stevedore is well appreciated and graphically described in *Strachan Shipping Company* v. *Melvin*, 327 F. 2d 83 (dissenting opinion of Brown, *C.J.*) and *McClendon* v. *Charante Steamship Company*, 348 F. 2d 298. See also, *Stanford Law Review*, Feb. 1968, Vol. 20, Number 3, *"'The Tar Baby': Maritime Personal-Injury Indemnity Actions."*

The fact that the employee whose dereliction is the cause of Marra being held liable to Spencer happens to be the plaintiff in this action should not change the substantive rule of law which has been referred to hereinbefore. Not only does Longo have the rights of a seaman but he has the correlative duty to perform his work in a workmanlike manner. *Holmes* v. *Mississippi Shipping Company*, 301 F. 2d 474, 481. The right to assert a counter-claim against a plaintiff is foreseen by Rule 14 of the Federal Rules of Civil Procedure for that rule provides that the third-party defendant may also assert any claim against the plaintiff which arises out of the transaction which is the subject matter of the plaintiff's claim against the third-party plaintiff.

Hoary principles of substantive law entitle Marra to recover indemnity from Longo because it is his negligence and his negligence alone which has cast Marra into liability to Spencer for a breach of Marra's duty to perform its work in a workmanlike manner.

Under the common law in those states where the plaintiff's negligence precludes his recovery of damages from the defendant-third-party plaintiff this question would never arise. However, under the maritime law or in those jurisdictions where comparative negligence of the plaintiff does not preclude recovery against the defendant-third-party plaintiff, the plaintiff can recover damages and the question which is posed in this case is thereby projected.

The U.S. Court of Appeals for the Second Circuit summarily disposed of the question in this case by relying on its own decision in *McLaughlin*, decided Jan. 30, 1969 (Appendix 7a). The McLaughlin case disposed of this issue by merely referring to its opinion in *Nicroli* v. *Den Norske*, 332 F. 2d 656.

That Court did not categorically decide the question which is here presented in its holding in *Nicroli* v. *Den Norske Afrika*, 332 F. 2d 651. Whatever that Court said with respect to the counter-claim is dictum in that on that subject that Court said (Page 656):

> "And *in any event*, the remedying of the dangerous condition was not the plaintiff's task." (Italics supplied)

By this language that Court in line with the District Court's opinion (210 F. Supp. 93) was adverting to the fact that International Terminal Operating Co., Inc., the stevedore-employer in the cited case, had been held liable because of the negligence of employees *other than* the plaintiff. The District Court (McGohey, *D.J.*) had held the

stevedore liable for the failure of supervisory employees, *not* the plaintiff, to do their work in a workmanlike manner. The Court said (210 F. Supp. 93, 97):

> "The Stevedore's counterclaim seeking indemnification from the plaintiff is based on the contention that it is only by reason of the latter's negligence or failure to do his job properly, that the Stevedore can be held liable. Whether in a case where the facts support such a contention indemnification is recoverable by the Stevedore employer from an employee injured in the course of his employment has never been decided on a full trial record, as far as I know.[7] *It cannot be decided here either, for the facts found here do not support the contention.* As the findings show, *the Stevedore's liability here results from the failure of its supervisory employees to hold up work on the morning of the 14th until the dangerous condition was corrected.* Accordingly, the Stevedore's counterclaim against Nicroli must be dismissed." (Italics supplied)

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[7] Compare Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962) (Feinberg, J.), and Cavelleri v. Isthmian Lines, Inc., 189 F. Supp. 525 (S.D.N.Y. 1960), reargument denied, 190 F. Supp. 801 (1961) (I. Kaufman, J.), with Malfitano v. King Line, Ltd., 198 F. Supp. 399 (S.D.N.Y. 1961) (Moore, C.J.), Judge Feinberg and Circuit Judge Kaufman, then a District Judge, denied motions to amend the pleadings to assert the counterclaim. Circuit Judge Moore, sitting by designation in the District Court, denied the plaintiff's motion to strike the counterclaim asserted in the original pleadings. The Malfitana case has not yet come to trial. In the instant case, a motion to amend the pleadings to assert the counterclaim was granted by Judge Metzner.

It will therefore be seen that that Court's opinion in the *Nicroli* case, based upon the record in that cited case and the decision of Judge McGohey, did not determine the right of the stevedore-employer to recover indemnity on his

counter-claim against the plaintiff-employee where the latter had been the sole employee whose negligence had cast the employer into liability.

No brief on this matter would be complete without reference to *Johnson* v. *Partrederiet Brovigtank,* 202 F. Supp. 859, and *Cavelleri* v. *Isthmian Lines,* 189 F. Supp. 525 and 190 F. Supp. 801, which arose on motions under Rule 15 for leave to plead a counter-claim against a plaintiff. The *Johnson* case was subsequent in time to *Cavelleri* and found *Cavelleri* to be "a persuasive precedent" for denying the motion, see page 864 of 202 F. Supp.

Adverting to Judge Kaufman's opinion in *Cavelleri,* we see that the same was based upon the mistaken forecast that a stevedore-employer could never be held liable for the negligence of the plaintiff-longshoreman, and hence a counter-claim could never lie.

Judge Kaufman was of the view that once the plaintiff's recovery is reduced by the extent of his contributory negligence, such contributory negligence is *excised* from the case. However, the law has not developed in that fashion as the case at bar discloses.

Here, Longo's contributory negligence has not been excised from the case, but has been used as the foundation and fulcrum for a directed verdict in favor of the shipowner against Marra and that is the principle which the Second Circuit follows. *Mortensen* v. *A/S Glittre,* 348 F. 2d 382, *McLaughlin* v. *Trelleborgs* (Appendix 7a). Manifestly, had the law developed along the lines envisioned by Judge Kaufman there would have been no need for nor could there validly be any counter-claim asserted by Marra against Longo. *Cavelleri* and its progeny, *Johnson,* therefore, came to an erroneous conclusion because the law subsequently developed in a fashion other than had been

contemplated. Direction of a verdict in this very case against Marra discloses only too well that the diminution of plaintiff's damages because of his contributory negligence does not "excise" his contributory negligence from the case. Not only has the shipowner been given the benefit of obtaining a diminution of damages, but he is then permitted to use that very same contributory negligence as a springboard to obtain indemnity against the stevedore via a motion for a directed verdict.

A much more accurate forecast of the manner in which the law would develop was taken by Circuit Judge Moore in *Malfitano* v. *King Line Ltd.*, 198 F. Supp. 399 (1961), which came up on on plaintiff's motion to strike the third-party defendant's counter-claim. How prophetic is the following language by Judge Moore, (p. 401 of 198 F. Supp.):

> "Adverting briefly to the four hypotheses assumed in Cavelleri, in the many cases represented as pending in which such counterclaims are asserted, *there are likely to be factual situations which are not within these hypotheses. Furthermore, taking the court's hypothesis (3) there may be real doubt that a reduction of a plaintiff's damages on a comparative negligence theory (50% is assumed) would completely remove the plaintiff's negligence from the case.*" (Italics added)

Although Judge Tenney in *Cusumano* v. *Wilhelmsen*, 267 F. Supp. 164, followed the prevailing law on this subject, he did indicate that the stevedore's plight and complaints with regard to this and other areas of the law were justified. Further, indemnification of the stevedore by the plaintiff has been indicated in a well written article to be "at least superficially just". *Stanford Law Review*, February 1968 Volume 20, p. 440: *The Tar Baby: Maritime Personal-Injury Indemnity Actions.* The author, an attorney repre-

senting shipowners, also comments upon the inconsistency in (a) allowing the plaintiff to recover against the shipowner despite his comparative negligence (b) the shipowner then being entitled to indemnity from the stevedore-employer by reason of that employee's negligence and (c) the latter being denied indemnity from the plaintiff despite the fact that it has been held liable solely because of the plaintiff's negligence which has not been excised from the case. Indeed, the author also points up the incorrectness of the three predicates of the holding of the Court in the *Johnson* case, *supra,* which is most often referred to as the leading case on this subject. The Court in the *Johnson* case was activated in greatest part by policy considerations. However, it must be appreciated that said policy considerations are gleaned by the Court from the *U. S. Longshoremen's & Harbor Workers Compensation Act,* 33 U.S.C.A. § 901 et seq. However, completely lost sight of is that the purpose of the bill which became said Act was simply to provide compensation. *Senate Report No. 973,* 69th Congress, First Session, 16. As Congressman LaGuardia said in connection with this Act (6th Cong. Rec. 5414):

> "This law simply gives the longshoremen the benefit of up to date legislation to cover injuries sustained in the course of their employment. That is all there is to it."

To the same effect is this Court's decision of April 1, 1969 in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.,* 89 S.Ct. 1144.

These very same policy considerations were argued to the U. S. Court of Appeals for the Second Circuit by plaintiff's counsel in the *Nicroli* case, *supra,* and although that Court does not refer to the same *in haec verba* in its

decision which disposed of this issue (p. 656 of 332 F.2d) its reasoning is permeated with the same.

Courts are called upon to determine cases, not causes. *Paluch* v. *Erie Lackawanna,* 387 F.2d 996, 1003; dissenting opinion of Moore, C. J. in *Crosson* v. *N.V. Stoomvart,* No. 422, decided April 16, 1969, Docket No. 31372, pp. 1911 to 1919 of Slip Sheets.

On the record in this case and any consideration of social policies this Court should accept this question, never before presented to, and decided by, this Court and seemingly only presented to the Second Circuit, as an Appellate Court, and should declare and clarify the Maritime Law on this subject.

The law does not thrive on anomalous, inequitable or captious interpretations. The issue, here presented, is one of the issues presented in the petition which has been filed in the *McLaughlin* case, October Term, 1968, No. 1334.

CONCLUSION

This petition commends itself to being granted so that a writ of certiorari issue to the Court below to which ends this brief is

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner
76 Beaver Street
New York, New York 10005
(212) WH 4-2633

APPENDIX

Memorandum Decision by Murphy, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2510

[SAME TITLE]

MURPHY, *D.J.*

On April 6, 1965, a jury returned a verdict for plaintiff in the sum of $800 and answered the written interrogatories upon issues of fact, one of which was their finding that plaintiff was 75% contributorily negligent. We reserved decision on plaintiff's motion to set the verdict aside on the ground of "insufficiency" (i.e., that the verdict was inadequate). We deny the motion.

We are satisfied that on the conflicting medical evidence and on the jury's prerogative not to accept *in toto* the plaintiff's testimony with regard to the extent and nature of his injuries and the fact that they did not accept the plaintiff's testimony with regard to his statement that the barge captain told him to use his longshoreman's hook, that the sum of $800 awarded by them was not "inadequate." This amount does not shock our conscience and we see no reason why the jury's 3½ hours of deliberation in a simple case should be disturbed.

In denying this motion we have treated the verdict as $800 although because of the jury's finding of plaintiff's contributory negligence at 75% we will have to direct the

entry of judgment in the sum of $200. That is not controlling on the issue of inadequacy. The jury was specifically asked in one of the written interrogatories to state the amount of plaintiff's damages without regard to his contributory negligence, if any. The fact that they attributed 75% negligence to the plaintiff is just another factor to be considered when appraising how the jury reacted to plaintiff's testimony.

Accordingly, the clerk is directed to enter a judgment of $200 in favor of plaintiff against defendant Lehigh Valley Railroad Co. with a judgment over by Lehigh Valley Railroad against William Spencer & Son Corporation for $200 plus costs and $500 for counsel fees pursuant to the indemnity agreement between such parties, and a judgment over in favor of William Spencer & Son Corporation in the same amount against the other third-party defendant Marra Brothers Inc.

These judgments over are pursuant to defendant Lehigh Valley Railroad's motions for a directed verdict upon which decision had been reserved and, accordingly, they are now granted.

Spencer is liable under its written contract of indemnity even though it had no employees working the barge because instead of doing the work itself it engaged Marra Brothers and Marra Brothers was in effect its alter ego or employee. Marra Brothers in turn is liable to Spencer for its failure to perform the stevedoring in a workmanlike fashion since it was their employee (plaintiff Longo) whose negligence accounted for 75% of his injuries.

These are orders. No settlements are necessary.

THOMAS F. MURPHY
U.S.D.J.

Dated, New York, N. Y., April 9, 1965.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 285—September Term, 1968.

(Submitted February 11, 1969 Decided February 11, 1969.)

Docket No. 30043

JACK LONGO,

Plaintiff-Appellee,

—v.—

LEHIGH VALLEY RAILROAD CO.,

Defendant and Third-Party Plaintiff,

—v.—

WILLIAM SPENCER & SON CORPORATION,

Third-Party Defendant,

—v.—

MARRA BROTHERS, INC.,

Third-Party Defendant-Appellant.

Before:

ANDERSON, FEINBERG, *Circuit Judges,* and
MANSFIELD, *District Judge.**

Appeal from judgment of the United States District Court for the Southern District of New York, Thomas F.

---

* Of the Southern District of New York, sitting by designation.

Murphy, *Judge,* dismissing counter-claim of repairman, Marra Brothers, Inc., third-party defendant-appellant, against plaintiff-appellee Longo, its employee. Affirmed.

MORRIS CIZNER, Esq. (Zimmerman & Zimmerman, New York, N. Y. on the brief), *for Plaintiff-Appellee.*

SIDNEY A. SCHWARTZ, Esq. (Alexander, Ash & Schwartz, New York, N. Y. on the brief), *for Third-Party Defendant-Appellant.*

PER CURIAM:

The sole issue in this case is the right of Marra Brothers, Inc., who had, through its stevedoring subcontract with Wm. Spencer & Son Corp., stevedore, become liable for a recovery by Longo for personal injuries against Lehigh Valley Railroad Co., shipowner, which had in turn been indemnified by the Spencer Corp., to counter-claim against its employee Longo, who was found to have been 75% contributorily negligent. The trial court held that Marra Brothers could not, and dismissed its counter-claim. Marra Brothers has appealed. Meanwhile, this court has heard and decided the same issue in another case and reached the same conclusion as to the applicable law. *McLaughlin v. Trelleborgs Angfartygs A/B,* Docket No. 30827, decided January 30, 1969, slip opinion pages 1197-1205. The judgment of the district court is, therefore, affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of February one thousand nine hundred and sixty-nine.

Present:

HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. WALTER R. MANSFIELD,
District Judge.

JACK LONGO,
Plaintiff-Appellee,

—v.—

LEHIGH VALLEY RAILROAD CO.,
Defendant and Third-Party Plaintiff,

WILLIAM SPENCER & SON CORPORATION,
Third-Party Defendant,

MARRA BROTHERS INC.,
Third-Party Defendant-Appellant.

Judgment of the Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant, Marra Brothers Inc.

A. DANIEL FUSARO
Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1968

Argued December 2, 1968 Decided January 30, 1969

Docket No. 30837

CHARLES MCLAUGHLIN,

Plaintiff-Appellee,

TRELLEBORGS ÅNGFARTYGS A/B,

—v.—

Defendant and Third-Party Plaintiff-Appellee,

—v.—

GOLTEN MARINE COMPANY, INC.,

Third-Party Defendant-Appellant.

Before LUMBARD, Chief Judge, FRIENDLY, Circuit Judge, and RYAN, District Judge.*

Appeal by a ship repairman from judgments of the District Court for the Eastern District of New York, Jacob Mishler, Judge, granting indemnity to a shipowner in respect of a personal-injury recovery against it by the repairman's employee and dismissing the repairman's counterclaim against the employee. Affirmed.

Joseph Arthur Cohen (Alexander, Ash & Schwartz, New York, N.Y.; Sidney A. Schwartz, of Counsel), for Third-Party Defendant-Appellant.

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* Of the Southern District of New York, sitting by designation.

Robert Klonsky (DiConstanzo & Klonsky, Brooklyn, N.Y.), for Plaintiff-Appellee.

William P. Kain, Jr. (Haight, Gardner, Poor & Havens, New York, N.Y.; Joseph V. Fleming, of Counsel), for Defendant and Third-Party Plaintiff-Appellee.

FRIENDLY, *Circuit Judge*:

This action in the District Court for the Eastern District of New York, in which federal jurisdiction was predicated on diverse citizenship, 28 U.S.C. § 1332, was brought by McLaughlin, a rigger employed by Golten Marine Company, against Trelleborgs Angfartygs A/B, owner of the freighter Lake Ontario, to recover for injuries caused by unseaworthiness of the vessel and Trelleborgs' negligence. Trelleborgs impleaded Golten. A jury brought in a special verdict that the ship was unseaworthy and Trelleborgs was negligent; that McLaughlin's damages were $12,000; that he had been contributorily negligent; that his damages should accordingly be reduced by $2,000; and that he should recover $10,000 against Trelleborgs. Question then arose as to Trelleborgs' claim for indemnity. Judge Mishler, relying on Mortensen v. A/S Glittre, 348 F.2d 382 (2 Cir. 1965), considered that the finding of contributory negligence on the part of McLaughlin was conclusive of Golten's breach of its warranty of workmanlike performance (WWP) and required a recovery in the absence of evidence that Trelleborgs had prevented Golten from fulfilling its obligation. Accordingly he directed a verdict in favor of Trelleborgs on its third-party claim for $10,000 plus the taxed costs and $3,500, the agreed amount of Trelleborgs' attorneys' fees and disbursements in defending against

McLaughlin's claim; he did not reduce this recovery to reflect comparative fault as requested in a counterclaim Golten had pleaded against Trelleborgs. He also dismissed another counterclaim wherein Golten had sought indemnity from McLaughlin for any liability it might incur by reason of his negligence. This last ruling was demanded by Nicroli v. Den Norske Afrika-OG Australielinie, 332 F.2d 656 (2 Cir. 1964), and we shall say no more concerning the portion of Golten's appeal that relates to it.

Trelleborgs had engaged Golten to perform repair and overhaul work in the engine room of the Lake Ontario while she lay at dock in Jersey City, N.J. Needing additional help, Golten employed two riggers, McLaughlin and Kewn, at a union hiring hall. They reported to the vessel around 1 P.M.; their job was to move some engine bearings from the ship to a truck that would haul them to Golten's machine shop.

The bearings, which were oily and greasy, were lying on the floor plates of the engine room near a hoist that ran up to a platform giving access to an upper passageway and, we assume, an exit from the ship. Erickson, Golten's foreman, instructed the men to use the hoist. Kewn placed the bearings in it and went to the platform to raise it; he was joined there by McLaughlin. They found that the hoist could not be elevated beyond a level some 2½′ below the platform. They did not report this to the ship's officers or to Erickson or explore other methods of removing the bearings, such as lowering the hoist to the floor and moving the bearings to another one. Instead, McLaughlin decided to climb into the hoist and hand the bearings out to Kewn. While attempting to do this, he slipped on the bearings and fell against the safety bar

of the hoist. This came out of its slots and McLaughlin fell to the engine room floor.

In *Mortensen, supra,* 348 F.2d 383, this court sustained the direction of a verdict on a ship's third-party claim against the employer of an injured plaintiff whom the jury had found guilty of contributory negligence. Golten attempts to distinguish *Mortensen* on the facts. In the alternative, it argues that if we should disagree on that score, the result here—where, as Golten puts it, the ship, which was found to have five-sixths of the responsibility for the accident, has succeeded in placing the entire liability plus its expenses on an otherwise guiltless employer of the man who was found to be only one-sixth responsible—is so manifestly unjust that something in the picture must be wrong.

The asserted distinction is that the employee in *Mortensen* had noticed the oil slick that caused the accident almost two hours earlier, and the employer, with this knowledge imputed to him, thus breached its WWP in failing to remedy the dangerous condition. See Drago v. A/S Inger, 305 F.2d 139, 142 (2 Cir. 1962); Nicroli v. Den Norske Afrika-OG Australielinie, *supra,* 332 F.2d at 656. In contrast we held in Calderola v. Cunard S.S. Co., 279 F.2d 475 (2 Cir. 1960) and Orlando v. Prudential S.S. Corp., 313 F.2d 822, 824 (2 Cir. 1963),[1] that a stevedore could not be cast in liability for failure to correct a dangerous condition when the employee had become aware of the danger only momentarily before the accident. If Golten could be held liable to the ship solely for failure to have the hoist put in proper order or to direct McLaughlin not to enter it, this distinction of *Mortensen*

[1] In neither case was it found that the employee was guilty of contributory negligence.

might well have merit. However, while a stevedore or other third-party defendant can undoubtedly be held for failure to correct a hazardous condition or prevent its employees from exposing themselves to danger of which it has knowledge, actual or imputed, that is neither the theory of *Mortensen* nor the full measure of the liability the Supreme Court has established.

The rationale of *Mortensen* was rather that the jury's finding of contributory negligence by the third-party defendant's employee was conclusive of breach of the defendant's WWP. This followed logically from an earlier holding of ours that a finding that an injured longshoreman had negligently exposed himself to danger required entry of a judgment for indemnity, even though the employer had no real opportunity for control. *Damanti* v. *A/S Inger*, 314 F.2d 395 (2 Cir. 1963).[2] See also *Shenker* v. *United States*, 322 F.2d 622, 628-29 (2 Cir. 1963) [express warranty]; *Nicroli* v. *Den Norske Afrika-OG Australielinie*, *supra*, 332 F.2d at 656.

The *Damanti* and *Mortensen* holdings apparently rested on an imputation of the employee's contributory negligence to his employer, which was thought to render the employer negligent as a matter of law. If there had been no other developments in the law of this subject, we might indeed wonder whether it might not be useful to have that position reexamined by the court *in banc*. The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a dis-

[2] The finding in *Damanti* had been on a trial of the indemnity claim rather than of the personal-injury claim, which the ship had settled.

ability preventing a plaintiff from recovering. See Restatement of Torts 2d § 463 (1965); 2 Harper & James, Torts § 22.10 (1956); Prosser, Torts § 64 (2d ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the employer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let alone the direction of one.

We think, however, that, under *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), the WWP is not so limited. The issue there was whether the warranty of workmanlike service "is breached where the stevedore has non-negligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." 376 U.S. at 315-16. The Court held it was. True Mr. Justice White stated that "the implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment," 376 U.S. at 321, and annotated this with a citation of our *Calderola* and *Orlando* decisions, see fn. 1. However, the Court went on to say that the standard was "whether the equipment was in fact safe and fit for its intended use" and that it did not "believe a rope designed to withstand three to five times the pressure exerted on it when it gave way satisfies the standard of reasonable safety." 376 U.S. at 322. We see no reason to suppose that the *Italia* doctrine applies only to material and not to human resources; indeed, the Court's

footnote reference to *Calderola* and *Orlando*, 376 U.S. at 321 n. 8, in support of a statement concerning equipment would not have been pertinent unless the Court considered that personnel should be treated on the same basis as rope. Putting the *Italia* criteria in human terms, while Golten did not warrant a perfect rigger, it did warrant one who would not in fact be negligent. Again, paraphrasing *Italia*, we do not consider that a rigger who stepped onto a set of oily and greasy bearings on a hoist suspended in mid-air was "safe and fit" to work on the ship or "satisfies the standard of reasonable safety." When we go behind the Court's statements to the reason given for them, namely, that "where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not," 376 U.S. at 324, we see no basis for a different rule regarding personnel. Golten hired McLaughlin and put him to work; the ship was not consulted. While it might have been impractical for Golten to take measures that would have prevented McLaughlin's negligence, the law in this area charges the employer with the results of employee carelessness so that the decision on what precautions to take will be made upon a weighing of all relevant costs. See Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 Stan. L.Rev. 423, 433-34 (1968).

We have considered whether a different view is required by the Supreme Court's recent summary reversal, *International Terminal Operating Co.* v. *N.V. Nederl. Stoomv. Maats.*, —— U.S. —— (1968), 37 L.W. 3150-51, see also —— U.S. ——, 37 L.W. 3219, of our decision in that case, 392 F.2d 763. We do not think so. The issue in *International Terminal* was whether the stevedore had breached

its WWP when its hatch boss allowed work to continue temporarily in an ill-ventilated hold on the faith of a promise by a ship's officer to activate a concededly adequate ventilating system. The jury, in response to a special interrogatory, had found that the hatch boss acted reasonably. The Supreme Court reversed a ruling by a divided panel of this court that the hatch boss acted unreasonably as a matter of law; it held that the issue of the propriety of his conduct was one of fact on which the jury's determination should not have been disturbed. We are reversing no jury determination here; the jury has found that McLaughlin acted unreasonably.

Golten's remaining point is that even if all this is so, we ought to be sufficiently resourceful to find some way to avoid the apparently irrational result whereby a shipowner who supplied a defective hoist emerges scot-free and a repairman who did nothing more than innocently recruit a careless workman from a hiring hall pays the full bill for the workman's injury and the ship's defense against his claim. It is true that a desire to find some solution for the problem stemming from *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), has led members of this court to indulge in occasional murmuring about a counterclaim by the stevedore against the ship, based presumably on the ship's breach of an implied warranty to the stevedore to supply a ship where the stevedore's employees could work in reasonable safety. See *Pettus* v. *Grace Line, Inc.*, 305 F.2d 151, 156 (2 Cir. 1962) (Clark, J., dissenting); *Williams* v. *Pennsylvania RR.*, 313 F.2d 203, 213 (2 Cir. 1963) (Friendly, J.). More recently, the Fifth Circuit, speaking through a judge with long experience in admiralty, said it was not "undertaking to rule for all time that in the adjustment of these complex warranties and

counter warranties or promises, there may never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties. . . ." *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 350-51 & n. 18 (1966) (John R. Brown, J.). What impresses us is that despite such expressions of desire, no court of appeals has undertaken to make them real. See Proudfoot, *supra*, 20 Stan. L.Rev. at 442-45. Probably that is as it should be. So long as *Halycon* v. *Haenn, supra*, 342 U.S. 282, remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court, unless current congressional interest in the complex problems arising from the creation of a new class of land-based seamen by the *Sieracki* decision, 328 U.S. 85 (1946), should result in the knot being cut in a more drastic fashion.

Affirmed.

Extract of Minutes

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 5th day of April in the year of our Lord, One Thousand Nine Hundred and Sixty Five.

Present:

HONORABLE THOMAS F. MURPHY,
United States District Judge.

[SAME TITLE]

Now comes the Plaintiff by Zimmerman & Zimmerman by; Morris Cizner, of counsel. Deft. and 3rd pty Plft.—Conboy, Hewitt, O'Brien & Boardman, by; Thomas V. McMahon, of counsel.—For 3rd pty deft.—Perrell, Nielsen & Stephen (Spencer)—by; Tidal B. Henry, of counsel and moves the trial of this cause. Likewise comes the 3rd Pty. deft. (Marra) by Alexander, Ash & Schwartz by; William N. Mairs, Jr., of counsel.

April 5, 1965—Jury empaneled, trial begun.

April 6, 1965—Trial cont'd. All parties rest. The Court dismisses deft. Marra counter-claim against the plaintiff. All defts. motions to dismiss the complaint—Decision Reserved. Summation of counsel concluded. The Court charges jury. 3:14 P.M. Charge concluded. 3:29 P.M. Marshals duly sworn to attend jurors. 6:55 P.M.—Jury

Extract of Minutes

Verdict returned on interrogatories which were submitted to the jurors by the Court. See attached Interrogatories and the jurors answers to those Questions. All defts. and 3rd Party defts. motions to dismiss the Complaint, etc. Reserved by the Court. Plaintiffs motion to set aside Verdict as being insufficient—Reserved.

1.—Is your verdict for the plaintiff or the defendant railroad?

Plaintiff

If your verdict is for the plaintiff please answer the following questions:

2.—Was the defendant Lehigh Valley Railroad negligent? Answer Yes or No.

No

3.—Was the defendant Lehigh Valley Railroad barge or lighter #357 unseaworthy? Answer Yes or No.

Yes

4.—Was the defendant Lehigh Valley Railroad's negligence the proximate cause of plaintiff's injuries? Answer Yes or No.

No.

5.—Was the defendant Lehigh Valley Railroad's barge or lighter #357's unseaworthiness the proximate cause of plaintiff's injuries. Answer Yes or No.

Yes

6.—Was the plaintiff himself contributorily negligent. Answer Yes or No.

Yes

Extract of Minutes

7.—If the plaintiff himself was contributorily negligent, what percentage of his negligence was the proximate cause of his injuries?

75%

8.—Did the barge captain tell the plaintiff to use his longshoreman's hook? Answer Yes or No.

No

9.—If your verdict is for the plaintiff what is the amount of his damages without giving any consideration to the question of his own contributory negligence, if any?

$800 Eight hundred dollars